

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

10,655

FILE: B-194492.2

DATE: July 3, 1979

MATTER OF: Radiation Systems, Inc.

[Protest of Evaluation Criteria]

DLC 02033

DIGEST:

1. When filed after closing date for receipt of proposals, protest alleging improprieties apparent on face of solicitation is untimely and not for consideration on the merits.
2. Requirement in Defense Acquisition Regulation (DAR) §3-508.2(b) that identity of proposed awardee be revealed prior to award to permit challenges to its small business size status does not require pre-award access by unsuccessful offerors to price proposal of proposed awardee.
3. GAO will not consider protest questioning small business size status of low offeror because conclusive authority to determine size status of business concerns lies with Small Business Administration (SBA).

DLC 008 41
Radiation Systems, Inc. (Radiation) protests a contract award to DHV, Inc. by McClellan Air Force Base, under requests for proposals (RFP) No. F0460-79-R-0208, a two-step negotiated procurement for antennas. *00718*

Radiation states that it is the low responsive bidder if proper consideration is given to all evaluation factors specified for the second step of this procurement. However, Radiation has been denied access to the proposal selected for award and is not in a position to articulate specific objections to the evaluation. It further objects to the Air Force's reliance on Defense Acquisition Regulation (DAR) §3-507.2(a) (1976 ed.) in refusing Radiation access before award to DHV's second step price proposal. Moreover, Radiation believes that DAR §3-508.2(b) envisions "bona fide negotiations" and applies only to "conventional negotiated procurements."

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It argues that this negotiated procurement, which limits the second step competition to price alone, cannot be described as "conventional." It therefore believes that public opening of step-two proposals should have occurred as required in formally advertised procurements under DAR 2-402.1. Although Radiation recognizes that the two-step negotiated procedure is authorized by an Air Force supplement to DAR (AFLC DAR SUP §3-805.2(b) (1975 ed.)), it asserts this authorization does not convert the procurement into a "conventional" negotiated procurement.

While the Air Force agrees that Radiation's proposal was responsive, it denies that Radiation's proposed price was low when evaluated in accordance with all evaluation factors. It states that AFLC DAR Supplement §3-805.2(b) merely assigns the name "two-step negotiations" to the negotiation procedure described in DAR §3-805.2(b), which permits prices to be solicited only from those whose technical proposals have been found acceptable after discussions.

The Air Force has denied a request by Radiation under the Freedom of Information Act (FOIA), 5 U.S.C. §552 et seq. (1976), for access to the step-one and step-two proposals of DHV. This Office is without authority under FOIA to direct, as Radiation requests, the Air Force to release this information and, in view of the Air Force's denial, Radiation's sole remedy is by suit in the United States District Court. DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47.

Radiation insists such information is needed for assurance that the proposals were evaluated fairly and in conformance to the solicitation. Generally, where an agency has denied relevant documents to a protester, we will review such documents in our consideration of the protest. E-Systems, Inc., B-191346, March 20, 1979, 79-1 CPD 192. An in camera review by this Office is unacceptable to Radiation.

To the extent that Radiation is contending this two-step procurement should have been implemented under procedures applicable to formal advertising (DAR, Section II) rather than negotiations (Section III), its protest

is untimely under section 20.2 of our Bid Protest Procedures, 4 C.F.R. Part 20 (1979), which requires that protests based upon alleged improprieties apparent on the face of the solicitation be filed prior to the closing date for receipt of initial proposals.

On the basis of the original request for technical proposals, Radiation had no reasonable grounds to believe that it would have access before award to the technical and price proposals of its competitors. It was clear on the face of the solicitation that the procurement was a negotiated one governed by DAR, Section III which does not permit public opening of technical proposals or the disclosure of prices before award "except in accordance with 3-508." See DAR §3-507.2(a). To permit challenge to the small business size status of the apparently successful offeror, DAR §3-508.2(b) requires, as a limited exception to the nondisclosure rule, that only the identity of the proposed awardee be revealed to unsuccessful offerors "in any procurement involving a small business set-aside to be placed through conventional negotiation."

Radiation's contention that a two-step negotiated procurement is not a "conventional" procurement within the meaning of DAR §3-508.2(b) is not well founded. DAR §3-805.2(b) specifically recognizes that unpriced technical proposals may be required first and price proposals later solicited only from those whose technical proposals, after discussions, have been found acceptable. Such procurements are not unique or unusual. See Consolidated Diesel Electric Company, B-193308, February 14, 1979, 79-1 CPD 106; Analog Hybrid Systems, et al., B-182547, December 3, 1974, 74-2 CPD 306; Tektronix, Inc., 53 Comp. Gen. 632 (1974), 74-1 CPD 107.


We believe that the word "conventional" is used in DAR §3-508.2(b) in the same sense as in DAR §1-706.2, which provides that contracts set aside for small business entered into either by conventional negotiation or by "Small Business Restricted Advertising" are negotiated procurements. Crown Laundry and Cleaners, 58 Comp. Gen. 103 (1978), 78-2 CPD 370. As indicated in the latter regulation, conventional negotiation is

distinguished from a set-aside procurement conducted under restricted formal advertising procedures, both of which are negotiated procurements conducted pursuant to negotiation authority cited therein. Washington Patrol Service, Inc., et al., B-188375, September 21, 1977, 77-2 CPD 209; Ira Gelber Food Services, Inc.; T&S Service Associates, Inc., 54 Comp. Gen. 809 (1975), 75-1 CPD 186.

Moreover, where price proposals are solicited only from offerors whose step-one technical proposals have been determined to meet the minimum needs of the agency, we find no legal basis to object to award being made to the responsive, responsible offeror submitting the lowest evaluated price based on factors specified in the solicitation.

As additional grounds for its protest, Radiation contends DHV, Inc. is not a small business concern. This is not a matter for consideration by this Office since 15 U.S.C. §637(b)(6) (1976) gives the Small Business Administration conclusive authority to determine the small business size status of a business concern for Federal procurement purposes. Mann's Construction Co., B-191462(2), March 29, 1978, 78-1 CPD 245.

The protest is dismissed in part and denied in part.


Deputy Comptroller General
of the United States